CACTUS MINES LIMITED

IBLA 83-731 Decided February 3, 1984

Appeal from decision by Administrative Law Judge Robert W. Mesch, declaring mining claims invalid. Arizona A-17000-H-1.

Affirmed as modified.

1. Administrative Practice -- Mining Claims: Contests -- Mining Claims: Determination of Validity -- Mining Claims: Hearings -- Rules of Practice: Government Contests

In a mining contest initiated by the United States, there is no requirement that the contestee offer evidence concerning matters not placed in issue by the United States. Where the Administrative Law Judge incorrectly states a contrary rule, but in practice applies the correct standard, his decision is affirmed.

2. Administrative Practices -- Mining Claims: Contests -- Mining Claims: Determination of Validity -- Mining Claims: Hearings -- Rules of Practice: Government Contests

In a mining contest initiated by the United States where the Government mineral examiners testify they have examined the mineral claims at issue and found no evidence of mineralization to support a discovery, a prima facie case for the Government is established. This showing is not overcome by evidence of ore sample values offered by contestee to show mineralization, where contestee fails to show from which, of 10 claims at issue, the samples were taken.

APPEARANCES: W. T. Elsing, Esq., Phoenix, Arizona, for contestee; Daniel L. Jackson, Esq., Office of the Field Solicitor, Phoenix, Arizona, for contestant United States.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Cactus Mines Limited, a sole proprietorship owned by C. B. Freeman, appeals from a decision by Administrative Law Judge Robert W. Mesch issued May 13, 1983, finding the Cricket Nos. 1 through 10 mining claims invalid for lack of mineral discovery. The claims declared invalid are 10 contiguous

mining claims located for gold by Freeman on October 10, 1979, in sec. 14, T. 1 N., R. 8 E., Goldfield Mining District, Gila and Salt River meridian, Pinal County, Arizona. On August 27, 1981, the land upon which the claims are located was segregated from mineral entry. 46 FR 49953 (Oct. 8, 1981). A hearing upon the contest initiated by the United States contesting the validity of the claims was held on February 8, 1983, at Phoenix, Arizona.

The contest proceeding before the Administrative Law Judge was based upon a complaint filed by the Arizona State Office, Bureau of Land Management (BLM), alleging the claims were invalid because there was no valid mineral discovery upon any of the claims and because the claims were not mineral in character. Freeman denied both allegations. In his May 13, 1983, decision the Administrative Law Judge found there had been no discovery, neither at the time of withdrawal in 1981, nor at the time of hearing in 1983. 1/ From this determination Freeman appeals, contending there was a discovery in the form of a "large, low grade disseminated ore body" (Appellant's Brief at 3). He argues that all 10 of the claims must be considered together as a single "ore body" constituting the discovery.

The Government case, consisting of the testimony of a geologist and a mining engineer, was found by the fact-finder to establish a prima facie case for invalidity of the Cricket claims. The May 13 decision fully and correctly states the facts established by the transcript of the February 8 hearing as follows:

> The [Government] geologist testified that he met the mining claimant, C. B. Freeman, on the claims in May of 1980 and Freeman pointed out areas that he felt contained good values of gold; he did not examine the claims at that time and contacted Freeman in July of 1980 to schedule an examination of the claims; at that time, Freeman advised him that he had nothing further to show him and he was unable to accompany him in an examination of the claims; he visited the claims in August of 1980 with the mining engineer and they talked to Freeman who advised them that he did not have anything further to show them on the claims; he later contacted Freeman by telephone and advised him that they were going to make a validity examination beginning August 31, 1981, and Freeman advised him that he had nothing to show them on the claims; he and the mining engineer arrived at the claims on August 31, 1981, and during a conversation with Freeman, they invited him to accompany them on their examination for the purpose of showing them the areas that he would like them to sample; Freeman declined the invitation and again stated that he had nothing to show them; they proceeded with their examination and took six samples from five of the claims; the samples were taken from the areas that Freeman had originally pointed out as worthy of sampling in May of 1980; during their examination, they did not find any other areas that they felt merited sampling; the

1/ Where lands are withdrawn from mineral entry, it must be shown there was a discovery of a valuable mineral deposit at the time of withdrawal and at the time of hearing. See Cameron v. United States, 252 U.S. 450 (1919). This standard was applied to the Cricket claims by the May 13 decision.

samples were assayed for gold and silver, which were the minerals claimed by Freeman; and each of the samples showed only a trace of gold and insignificant silver values, i.e., at best, 0.05 ounces of silver per ton of material.

The Government geologist expressed the opinion, based principally upon the assay results of the sampling from five of the claims and presumably upon the absence of any mineralization worth sampling on the other five claims, that a person of ordinary prudence would not be justified in expending further means in developing the contested claims. The Government mining engineer expressed the opinion, based upon what he termed the extremely low values of the assays, that the claims have no value for minerals. Both witnesses indicated that the gold values were such that they could not be equated to even the lowest of quantifications; the silver values would equate to about 45 cents per ton of material with silver at $9.00 per ounce; and if there was any quantity of the silver mineralization within the claims, it would cost several dollars per ton of material to dig it out of the ground. The witnesses' opinions apparently related to the time of the withdrawal in 1981. In view of market conditions, there is no question that the opinions would be equally applicable at the time of the hearing.

[1] Based upon this evidence, the trier of fact concluded, correctly, that the Government had satisfied its burden of going forwarded with the contest by showing evidence sufficient to establish a prima facie case that the claims were invalid. See United States v. Williamson, 45 IBLA 264 (1980). However, the Judge on his own motion, at this point raised an erroneous theory concerning the nature of the burden of proof which shifts to the miner following prima facie proof of invalidity. Thus, he states at pages 3-4 of his decision:

When the Government contests the validity of a mining claim it bears only the burden of going forward with sufficient evidence to establish a prima facie case of invalidity. If a prima facie case is presented, then the burden of proof shifts to the mining claimant. What that burden of proof is, has become clouded and confused by recent decisions of the Board of Land Appeals. As shown in the attached Appendix, the Courts have consistently ruled, the Department consistently ruled until 1980, and the Department has sporadically ruled since 1980, that in mining claim contests the Government has the burden of presenting a prima facie case in support of the allegations asserting noncompliance with the mining laws and the invalidity of the claim, i.e., that there was no discovery of a valuable mineral deposit; and, if this is done, the mining claimant then has the burden of establishing by a preponderance of the evidence that the requirements of the mining laws that have been placed in issue have been met and, therefore, the claim is valid, i.e., that there was a discovery of a valuable mineral deposit. If the mining claimant fails to satisfy his burden of proof, then the mining claim must be declared invalid.

> However, as shown in the attached Appendix, in 1980 the Board of Land Appeals began ruling, but not consistently, that the mining claimant does not have the burden of showing that the requirements of the mining laws that have been placed in issue have been met and, therefore, the claim is valid. The mining claimant has, what the Board has termed, only the "burden to preponderate on the issues raised by the evidence". If the mining claimant's evidence casts sufficient doubt on the Government's prima facie showing of invalidity, i.e., that there was no discovery, and can be characterized as "overcoming" the Government's case -- even though the evidence is not adequate to support the conclusion that the requirements of the mining laws have been met, i.e., that there was a discovery -- then no ruling will be made on the issues presented for determination, i.e., whether there was or not a discovery, or the validity or invalidity of the claim, and the contest proceeding will simply be dismissed.
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> I believe the proper rule concerning the mining claimant's burden of proof is the one announced at an early date by the Department, consistently followed by the Department until 1980, occasionally followed by the Department thereafter approved by the Court of Appeals in three circuits. That rule will be applied in this decision. [2/]

The cases engendering the conflict referred to by the Judge are, principally, the Board's decisions in United States v. Taylor, 19 IBLA 9, 82 I.D. 68 (1975); and United States v. Hooker, 48 IBLA 22 (1980). The Hooker decision is especially criticized by the opinion below, which states this analysis of the decision, in an Appendix to the May 13 decision:

> If as stated in the Hooker case, the mining claimant's burden is to preponderate on the issues raised by the evidence, then a question certainly arises as to how a mining claimant can preponderate on the issue of discovery -- and as a necessary consequence the validity of the claim -- without showing by a preponderance of the evidence that a discovery has, in fact, been made and the claim is, therefore, valid.
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> In the Hooker case, the Board of Land Appeals referred to its decision in Taylor, supra, as the leading case on the question of the burden of proof and purported to follow the Taylor case. However, in the Hooker case, the Board construed the evidentiary rules so that nothing could be decided on the issue presented for determination, i.e., whether a discovery had been made and the claims were valid or invalid, and, as noted in the concurring opinion in the Taylor case, converted the proceeding into an exercise in futility. The Board also ignored the decisions of the District of Columbia Circuit, the Ninth Circuit and

2/ This error is not an isolated occurrence in mining contest decisions coming from the Department's Administrative Law Judges. See, e.g., United States v. Cannon, 70 IBLA 328, 329 (1983); United States v. Imperial Gold, 64 IBLA 241, 243 (1982).

> the Tenth Circuit, noted above, holding that when the Government presents a prima facie case of invalidity, the mining claimant has the burden of showing by a preponderance of the evidence that his claim is valid. [Emphasis in original.]

To explain the anomaly ascribed to the Board's opinions by the May 13 decision, both the Taylor and Hooker decisions must be examined in the context of the situations in which they arose. In so doing, it must be kept in mind that mining claim contests are essentially factual determinations, and that the inquiry by this Department and the courts into the validity of any claim under the mining laws is essentially a matter of fact-finding. See 30 U.S.C. § 22 (1976); Barton v. Morton, 498 F.2d 288 (9th Cir. 1974). Of course, the ultimate issue in every contest concerns in some fashion the existence of valuable mineral deposits on the claim.

In Taylor, it was significant that the mineral deposit was not a precious metal, but a gravel deposit. The issue in Taylor, as a consequence, concerned only indirectly the existence of the gravel deposit itself, which was a given requirement for the claim. The real problem in the case for the miner, however, and the issue raised by the Government in the contest action brought, concerned whether there had been a market for the material prior to July 23, 1955. It was upon this issue that the contest was joined and decided, as explained by the Taylor opinion:

> The claim was located on April 4, 1955 (Tr. 47). This was prior to the Surface Resources Act of July 23, 1955. Section 3 of that Act, 30 U.S.C. § 611 (1970), declared that common varieties of sand and gravel and certain other materials are not valuable mineral deposits under the mining laws (30 U.S.C. § 22 et seq. (1970)); Coleman v. United States, 390 U.S. 599 (1968). In order for a mining claim for a common variety of sand or gravel located prior to the Act of July 23, 1955, to be sustained as a claim validated by a discovery, the prudent man-marketability test of discovery of a valuable mineral deposit must have been met at the time of the Act * * *.

19 IBLA at 17, 81, 82 I.D. at 70.

The Taylor opinion then goes on to discuss the tests which have developed from decisional law to determine whether the existence of the statutory requirement of a valuable mineral deposit has been proved. 3/ In

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3/ Taylor, supra at 18, 19, 82 I.D. at 71, states the customary rule:

"The prudent man test requires that there must be a showing of minerals in sufficient quantity that: '[A] person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine * * *.' Castle v. Womble, 19 L.D. 455, 457 (1894), approved in Chrisman v. Miller, 197 U.S. 313, 322 (1905). Especially as to materials in common abundance as sand and gravel, this Department has long required special evidence in addition to a showing of a quantity of mineralization. Thus, it was stated in an Acting Solicitor's Opinion, 54 I.D. 294, 296 (1933): '[T]he mineral locator or applicant, to justify his possession, must show that by reason of accessibility, bona fides

the light of these customary standards, it was concluded that the issue in the contest, whether there had been a market demand for the gravel from the claim on July 23, 1955, should have been decided against the claimant. The Board stated the rule to be applied in such cases, id. at 23, 82 I.D. at 73, to be: "When the Government contests the claim has only the burden of going forward with sufficient evidence to make a prima facie case of lack of discovery and then the affirmative burden of disproving the Government's case by a preponderance of the evidence devolves upon the claimant." In Taylor, however, because the dispositive issue centered around whether a market existed in 1955 for the gravel, the evidence was concentrated upon that single aspect of the case. The meaning of the decision in Taylor is explained by the concurring opinion in Taylor:

> It is only incumbent on the contestant to make one prima facie case, which the contestant succeeded in doing by raising the presumption that the material was not marketable on the criticaldate.Thenonmarketability thus shown need not relate to the quantity or quality of the gravel. It could have to do with the absence of a demand, see United States v. Bartlett, 2 IBLA 274, 78 I.D. 173 (1971); or some physical element which would make mining costs prohibitive, United States v. McCall, 7 IBLA 21, 79 I.D. 457 (1972); or because longer hauling costs make the material noncompetitive, as in United States v. McCall, 1 IBLA 115, 119 (1970). Therefore, the contestant was under no obligation to supply evidence that the quality of the gravel was substandard or that the quantity was insufficient on the Ute Park No. 1 claim. The contestant might even have adduced evidence that the quantity and quality were exceptionally good without destroying the prima facie case that the material was nevertheless non-marketable on the critical date. The contestant having made a prima facie case, it then devolved upon the contestees to rebut that case by a persuasive showing that material from the claim could have been marketed at a profit on the critical date and that such marketability has continued without substantial interruption.

19 IBLA at 42, 43, 82 I.D. at 82, 83. Nothing in the lead opinion in Taylor should be seen to be inconsistent with this quoted statement of principle.

The Hooker decision principally involved two uranium lode mining claims which had been declared invalid following contest proceedings initiated by the United States. In Hooker the Board once again interprets the language of the Taylor decision to explain its apparent meaning: That matters of fact not

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fn. 3 (continued)
in development, proximity to market, existence of present demand, and other factors, the deposit is of such value that it can be mined, removed and disposed of at a profit.'" These additional criteria -- the marketability at a profit test -- were approved in Foster v. Seaton, 271 F.2d 836, 838 (D.C. Cir. 1959), and recognized in Verrue v. United States, 457 F.2d 1202 (9th Cir. 1972). The marketability test is a refinement of the prudent man test. Coleman v. United States, 390 U.S. 599, 603 (1968).

placed in issue by the United States in a contest proceeding, and therefore, presumably not relevant to the contest, need not be disproved by the miner. It is in this context that the Hooker Board makes the observation, criticized by the Administrative Law Judge in the decision in this case, that

> dismissal of a contest complaint does not determine the validity of the claim, but merely establishes that, as to the issues raised in the hearing, the mineral claimant has preponderated. Thus, in a hearing on a Government contest complaint, there is no requirement that a mining claimant show that the claim is valid; rather, the mineral claimant's burden is to preponderate on the issues raised by the evidence.

48 IBLA at 26, 27.

This language must be understood in the context of the mining claims in which it arises. In Hooker, the validity of two uranium claims was in issue. After first explaining the prior ruling in the Taylor decision, and emphasizing that the case under consideration was a mining contest and did not involve a patent application, the opinion merely stated the obvious requirement of any sensible procedure to facilitate fact-finding: That issues not raised by the Government case were not required to be rebutted by the miner's evidence. Illustratively, Hooker summarizes this dictum from Taylor:

> Nevertheless, even in a patent application, a mineral claimant does not run the risk of nonpersuasion on an issue where there has been no evidence presented. On the contrary, as Taylor notes, when this Board determines that a lack of evidence on an essential issue raises a reasonable doubt as to the validity of the claim, the proper action is to remand the case for a further hearing; it is not to declare the claim invalid. At the subsequent hearing it would still be necessary for the Government to establish a prima facie case of invalidity on such essential issue before that issue may serve as a predicate to declare the mining claim null and void. Thus, even if this appeal involved a patent application, which it does not, the Judge's statement that appellant had an affirmative duty to establish the validity of the claim, beyond the duty of preponderating on the issues raised by the evidence, and failing in which the claim would be declared invalid, is in error. [Emphasis supplied.]

48 IBLA at 27. In the Hooker case, the testimony of the principal Government witness was based upon an erroneous premise. He held an opinion that the claims were invalid because the uranium discovery was not definitely and entirely "blocked out" so that its extent was fully known or, even more stringent, that the claim was not an actual "mine." His opinion was, therefore, demonstrably erroneous, a fact noticed by the fact-finder, who nonetheless considered the objective portions of his testimony. The evidence presented by the contestee miner consisted of proof of valuable samples by the location of which he attempted to project over a greater range the mineral which had been detected. By inference he thereby estimated the probable existence of a large ore body continuing in a perceived pattern from the sampled sites. This speculative evidence was unsupported, however, by geologic analysis or supporting evidence. Thus, although the record established the existence of

uranium, its quantity was left in doubt, neither party having established whether or not there was a likely prospect the material might be developed into a valuable mine. Under the circumstances of the case, therefore, the contest was dismissed, because the Government failed to produce sufficient evidence of the claim's invalidity. Although the Hooker explanation does not fully explain all the possible meanings of language appearing in Taylor, it does emphasize the practical application of the Taylor decision and the logical limitations to the decision. In the context of this appeal, these cases simply stand for the proposition that matters not placed in issue by the Government case need not be disproved by the miner. The conclusion by the Administrative Law Judge, therefore, that appellant has an affirmative duty to establish the validity of his claim, is not necessarily true. In the context of this contest, however, the erroneous assumption contained in that conclusion does not lead to error.

It is apparent that in this case, as in Hooker and Taylor, the Administrative Law Judge overemphasized the importance of the procedural aspects of the case. 4/ It is apparent his attempt to extract generalized legal principles from the factual determination in Taylor and Hooker leads to the error which he now ascribes to Hooker and subsequent Departmental decisions. Strangely, although an erroneous legal principle is stated by the fact-finder, his decision applies the correct standard. In this case, it is quite clear that the Government did, in fact, establish the prima facie case about which there was so much discussion in the decision below. The two witnesses for the United States, after repeated attempts to cooperate with Freeman in examination of the claims, spent several days examining the claims, during which they tested the places which had been previously indicated by Freeman to be considered mineralized. The results of their examination indicated there was no gold to be found at the indicated points or any other places on the claims tested. A small amount of silver, too little to be economically producible at any price obtainable for silver at any time relevant to the contest, was found. The objective evidence offered by these witnesses established a firm foundation for their opinions that the claims were invalid. The Administrative Law Judge so ruled. At this point it was incumbent upon Freeman to come forward with evidence of the contrary. See also discussion at United States v. Montgomery, 75 IBLA 358, 362 (1983). The Administrative Law Judge correctly found that such contrary evidence was not produced.

[2] Freeman offered evidence of numerous samples taken by him, some of which, when analyzed for the gold and silver, showed varying degrees of mineralization. These samples, he argues, indicate the existence of mineralization sufficient to support a pit operation using a leaching process to recover gold. He refused or was unable, however, to state from which

4/ See Appellant's brief at page 1, where appellant criticizes the decision below as being a "law review article on the procedural aspects of 'burden of proof' and 'prima facie cases'. Because of the exasperated emphasis placed upon" these matters by Judge Mesch, this Board also is required to emphasize an aspect of the case which was of no interest to Freeman. On appeal, Freeman urges that his proof established the existence of a valid discovery. His interest is therefore confined to the ultimate issue in the case.

claims the ore samples were taken. Thus, in answer to questions by the Administrative Law Judge, Freeman stated concerning his ore samples:

> A. I can't say for sure which ones came from where. All I know is that this all came off of Cricket Mines, 1 through 10, out there. And that, I can tell you for sure. See, what's in my mind is making a living out there.
>
> Q. It it fair to state, sir, that you don't really -- you can't tell us for certain-sure, which one of those came from which part.
>
> A Yes, sir.
>
> Q Your testimony -- isn't your testimony really that all just kind of come from the mines collectively.
>
> A Well, I gave you to the best of my opinion exactly where I can tell you the locations that these came from.
>
> Q Okay, what about Cricket 7?
>
> A. I can't say, exactly, that any of these would be in that.
>
> Q Okay, what about Cricket 5?
>
> A Again, I couldn't -- I can't say, exactly.
>
> Q How about Cricket 3?
>
> A Yes.
>
> Q Which ones?
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> A I went over it once.

(Tr. 106-07).

Commenting upon Freeman's testimony concerning this aspect of his claim, the Judge states at page 7 of his May 13 decision:

> Mr. Freeman's testimony was directed principally to the status of the claims at the time of the hearing and to the claims as a group; and, as consequences, no definite conclusions can be reached from his testimony as to (1) whether he believed he had found a valuable mineral deposit within the claims as a group at the time of the withdrawal, or (2) the nature and extent of the mineralization he believed he had found within any one of the contested claims either at the time of the withdrawal or the time of the hearing.
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> Mr. Freeman's testimony indicates only that at the time of the hearing he believed that he had found a valuable mineral

> deposit somewhere within the area of the claims as a group. It does not show that the mineralization found within each of the contested claims was sufficient in itself to warrant a mining operation either at the time of the withdrawal or the time of the hearing. It does not even show that the quantity and quality of the mineralization found within each of the 10 claims was such that each claim would be mined in connection with a mining operation covering all of the claims as a group as of the two crucial periods of time. In other words, his testimony does not show that each of the ten claims contained enough of the valuable mineral deposit that he believed he had found to warrant the inclusion of each claim in a group mining operation.

The conclusion reached is fully supported by the record and accurately applies the applicable law, which is to the effect that Freeman was obliged to show, in response to the Government case, as to each of his 10 claims, the existence of a valuable deposit which a prudent man would have been justified in working with a reasonable prospect of developing a valuable mine. See United States v. Williamson, supra; United States v. Melluzzo, 76 I.D. 181 (1969). The fact-finder correctly concluded that the testimony of Freeman was incompetent to establish the discovery of a valuable mineral on any of the 10 claims.

In addition to his own testimony, Freeman offered two witnesses, a consulting geologist and a mining engineer. The geologist testified concerning the mechanics of the deposit of ore by volcanic action. Concerning the 10 claims at issue, however, he stated:

> Okay, I'm not saying there's an ore body there. I went out there one day and the alteration patterns fit very well to this model and the structures fit very well to it. It's an area -- it's a type of deposit that should be evaluated in a method much different than a simple fissure vein evaluation. Plus, if you had a simple fissure vein, you could sample it with a few samples. Although I don't think a ten-claim block of mineralization alteration -- to realistically evaluate that property, it would require hundreds of samples to realistically say there's nothing there.

(Tr. 119). The geologist then concluded: "I'll say it's susceptible for further development. I can't say it's ready to be developed tomorrow, from what I know of it. It could be. I just don't have those facts" (Tr. 149). His testimony was, therefore, merely theoretic in nature and might have served to support testimony concerning the location or extent of minerals on the claims. 5/ The geologist did not, however, offer any evidence concerning mineralization upon the 10 claims.

5/ This type of evidence might have been helpful, for example, to the miner in the situation described in Hooker, where geologic evidence was lacking to support a theory which was not wholly inferable from objective facts. See, e.g., United States v. Downs, 61 IBLA 251 (1982); United States v. Walls, 30 IBLA 333 (1977). See also the discussion of the use of geologic inference in the dissenting opinion in United States v. Edeline, 39 IBLA 236, 253 (1979).

The testimony of the mining engineer was offered to show mineral values in certain ore sample tests. His testimony was rejected, however, since it appeared he was unfamiliar with the actual testing for the purported samples, had not performed it himself, and had no personal knowledge of the tests or the ore sampling upon which the tests were presumably based. The Administrative Law Judge correctly concluded his testimony had no value. On the record presented, therefore, Freeman failed to offer any evidence of the existence of a valuable mineral deposit on any one of his 10 claims. His failure to come forward with evidence to show that his claims were valuable for gold and associated minerals, to disprove the Government showing to the contrary, supports the fact-finder's decision that the claims are invalid.

An additional matter was commented upon by the Administrative Law Judge as support for his decision. Freeman's contention that his claims were presently valuable as long ago as 1979, is clearly inconsistent with his failure ever to produce any gold or silver. As the May 13 decision observes:

> [I]f, as it appears from his testimony, he [Freeman] can remove gold from the claims at a profit in the neighborhood of $80.00 per ton, he has hundreds of millions of tons of proven commercial ore, and he has the equipment necessary to work the property, then it is difficult to understand why he has not as yet engaged in any commercial mining operation on the claims, or why he has not even removed and sold any gold from the claims.

It has been held that such evidence can independently establish a prima facie case of invalidity, albeit a weak one. See United States v. Hess, 46 IBLA 1, 7-9 (1980). In this case, however, the Government's case is directly established by the testimony of the examining geologist and engineer, which Freeman failed to overcome with his offered proof. His failure to testify concerning the derivation of the ore samples which he offered to show the existence of mineral value is fatal to his defense of his claims, as the Administrative Law Judge held.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

Franklin D. Arness
Administrative Judge
Alternate Member

I concur:

Gail M. Frazier
Administrative Judge

ADMINISTRATIVE JUDGE MULLEN CONCURRING:

I concur with the majority opinion but find it necessary to make a few additional comments regarding the opinion of Administrative Law Judge Mesch.

As an initial matter I note that Judge Mesch goes to great length to support his application of the law regarding the burden of proof that rests with a claimant after a prima facie case has been established by the Government. Discovery is but one element of validity. In turn, discovery contains three elements: quantity, quality, and marketability. If a claimant fails to preponderate on any element at issue the claim is properly declared to be invalid. When the Government chooses to challenge the validity based upon the failure of the claimant to satisfy any one or more of these elements of validity and/or discovery, the Government then has the obligation to establish a prima facie case as to each element of its charges. If a prima facie case is established with respect to an element, the claimant must preponderate as to that element to overcome this prima facie case. A claimant does not have any obligation to present evidence as to elements of validity for which a prima facie case has not been made. If the evidence presented when establishing a prima facie case is directed only to the quality of the mineralization present, the claimant need not present evidence as to the quantity of mineralization or the marketability of the product. The illogical extension of the rule of law advanced by Judge Mesch is that a prima facie case as to the nationality of the claimant raises the issue of discovery, and the claimant, after proving that, he is in fact a citizen of the United States, must also prove that he has a discovery on the claim. 1/ I trust that in future decisions Judge Mesch will apply the proper test with respect to the burden of proof resting with a claimant.

As for the merits of the appeal, I agree with the conclusion in the principal opinion that the evidence presented by the Government through the testimony of its mineral examiners was sufficient to establish the requisite prima facie cases against the asserted discoveries; however, I would emphasize that this evidence was not especially strong. It could have been overcome by a reasonable presentation of relevant and reliable rebuttal evidence by claimant. Because of my view in the regard, I will comment separately on the evidence presented.

1/ In support of his position Judge Mesch cited United States v. Conner, 72 IBLA 254 (1983). This decision was authored by me. At the time of the decision I found that the opinion by Judge Mesch fairly and accurately stated the facts in that case. However, the rule of law applied by him and used in his opinion in this case was not correct. I do not deem it necessary to modify Conner, however, as subsequent cases by this Board have properly stated the burden on the claimant and the results of the Conner case would not be changed or modified. I wish to note that in the case now being considered Judge Mesch properly ignored the issues of citizenship, marketability of the product, title, lode versus placer location, and proper monumenting the claim. None of these requisites to validity were raised by the Government and, therefore, the claimant had no burden to offer proof of these facts.

The appellant located 10 contiguous mining claims. The Government initiated a contest against all 10 of these claims. Thus, the issue of discovery was raised as to each claim. See United States v. Williamson, 45 IBLA 264 (1980); United States v. Meluzzo (Supp. on Judicial Remand), 32 IBLA 46 (1977). For his part, claimant could not rely on evidence simply for the claims as a unit. United States v. Bunkowski, 5 IBLA 102 79, I.D. 43 (1972); United States v. Chas. Pfizer & Co., 76 I.D. 331 (1969).

In support of its contest the Government presented not one but 10 prima facie cases. For those claims from which samples were taken the Government cases were stronger than they were against the claims contested merely on the basis of an examination and determination that there was not sufficient mineralization to warrant samples. Nonetheless, the Government's conclusion that there was no discovery on any of the claims was adequately supported by the testimony regarding the conduct of the investigation and observations made at the site of the claims.

Appellant presented 39 sample assays as evidence in support of the validity of the claims. Of these assays 19 indicated less than 0.10 oz. Au/ton, 11 had assay values between 0.10 and 0.20 oz. Au/ton, 2 had assay values between 0.20 and 0.50 oz. Au/ton, and 7 had assay values above 0.50 oz. Au/ton. While 20 of the samples could be considered to contain values that would support a discovery, the assays presented were of no use to Judge Mesch or this Board because of appellant's unwillingness or inability to identify the claim or claims from which the samples were taken, the sampling method(s), or even the person who took the samples. Moreover, the evidence clearly demonstrated that appellant had no orderly assaying program and that the sampling techniques were at best suspect. Thus, claimant's evidence concerning assay values was essentially without probative value.

The expert witness for claimant also testified that the geologic setting was favorable for the deposition of a commercially viable disseminated gold deposit. However, he failed to demonstrate that such a deposit actually exists on the claims. The basis for his conclusion that a discovery was present on the claims was his belief that the claims could be sold or leased to a major mining company. Even if this were true, it must be shown that a major mining company would expend its time and effort to develop a mine. It is common knowledge that most of the properties leased or acquired by major mining companies are subsequently abandoned because, while the geologic setting was favorable, the property did not prove to have sufficient mineralization to justify development.

The Government case was based on the lack of mineralization of sufficient quality to warrant development of a mine. The appellant's case appears to have been directed to the probability of being able to develop sufficient quantity of mineral to warrant development of a mine. If the location of the higher grade assays could have been identified with sufficient accuracy to be reliable, there is a possibility that the Government prima facie case might have been overcome with respect to one or more of the claims. 2/ Instead,

2/ While the proof of quantity and quality are often interrelated, a claimant must prove that a valuable mineral is actually present on each of the claims. Once mineral is demonstrated to be present, the proof of sufficient quality and quantity of mineral to warrant development can take into

the appellant chose to defend the group as a whole, ignoring the requirement that the discovery must be shown on each of the claims. I believe this to have been an unfortunate choice. The Government's prima facie cases were not overcome by the claimant.

R. W. Mullen
Administrative Judge

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fn. 2 (continued)
consideration the overall mining operation. There is little question that circumstances exist in which a group of mining claims containing low grade one can support a mining operation, and thus demonstrate a discovery on each claim, even though taken individually the claims might not contain sufficient quantity of ore of sufficient quality to support discovery. However, that fact does not relieve the claimant from the responsibility for presenting the proof of mineralization and the suitability of the project to low grade high tonnage extraction.